APPEAL NO. 93180

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was convened in (city), Texas on December 4, 1992, (hearing officer) presiding, and was continued until January 29, 1993. The appellant, hereinafter claimant, appeals the hearing officer's determination that he did not sustain an injury to his head, back, and neck and mental trauma injury in the course and scope of his employment on (date of injury), and that claimant had no disability from July 30 through August 30, 1992. (We note that both claimant and his attorney filed separate requests for this panel's review. However, as claimant's individual request was not timely under Article 8308-6.41(a), it will not be considered.) The respondent, hereinafter carrier, essentially argues that the hearing officer's decision and order should be affirmed.

DECISION

We affirm the decision and order of the hearing officer.

Claimant was employed as a salesman for (employer) beginning in June of 1992. As part of his job, he accompanied prospective buyers in test drives of cars. He testified that on (date of injury), he took a customer on a test drive. He said that initially he was driving in an area that had no traffic or people around. When he asked the customer if he wanted to try the car, claimant said the customer put a knife in his face and said, "[g]et the **** out of here." He later testified that the assailant was holding both a knife and a gun. He also said the man punched him twice, hit him on the ear and also on the back, legs, and head, threw him to the ground, and drove off in the car. Claimant called the dealership and had someone pick him up and take him back there. Later he talked to the police at the dealership, and a report was filed.

It was employer's policy, as embodied in written instructions signed by claimant at the time he was hired, to require salesmen to follow certain safety precautions before taking customers on test drives. These included obtaining identification, photocopying the customer's driver's license, and keeping control of the keys at all times. Claimant admittedly did not follow this policy,[1] although he contended it was not explained to him at the time of his hire, and he said these procedures were not followed most of the time. Nevertheless,Mr B, employer's used car manager, said that employer terminated any employees they were aware of who violated the policy. Claimant was terminated the next day, although he was hired shortly thereafter by another dealership. He was terminated from this job after about two weeks because of poor performance.

---

[1]We note that the violation of an employer's rules relating to the manner of doing work does not destroy an employee's right to compensation. Westchester Fire Ins. Co. v. Wendeborn, 559 S.W.2d 108 (Tex. Civ. App. - Eastland 1977, writ ref'd n.r.e.).

The claimant said he thought he reported an assault to several coworkers. However,Mr B, a salesman who had been asked to pick up claimant and bring him back to the dealership on July 3rd, testified that claimant merely told him the customer drove off as they were changing seats in the car. He also said that when he arrived at the location, claimant was walking down the street and was not disoriented or limping. Mr B, employer's used car manager, also said claimant did not tell him he was assaulted. Nancy Walker, who investigated this claim for the carrier, said that no one she talked to at the dealership knew of an assault initially. She also said that claimant told her the first time he called police and said he had been assaulted, they hung up on him. She said he told her the assailant kicked him and pulled a knife on him, but that she did not hear anything about a gun until the benefit review conference.

Claimant introduced a signed, transcribed statement of Mr D, who had been a coworker on July 3rd. Mr. D stated that claimant "immediately came back and told me" about the incident and showed him a bruise on his leg. He said he could not remember specifically the kind of weapon claimant said the assailant used. In a supplemental statement Mr. D said he told carrier's adjuster that claimant told him he had gotten hurt, but that she did not take his statement.

The police report filed July 3rd states, "[s]uspect stole vehicle from salesman after test drive." On August 14th claimant contacted the police to supplement the original report; at that time he told the police the case was actually a robbery because the suspect punched him in the face several times. The report said the claimant said he was injured and could not remember the details when the original report was made. The police officer taking the statement accordingly changed the title of the offense.

On July 30th the claimant saw Dr. H, giving a history of the assault, and complaining of headache and low back and neck pain. The claimant underwent an MRI which disclosed essentially negative cervical spine with minimal anterior spondylosis C4-5; essentially negative skull series; and moderate narrowing L2-3 interspace and Grade I spondylolisthesis L5 on S1. Dr. H concluded the claimant had experienced trauma to the spine and referred him to Dr. F. Dr. F initial medical report gave a history of phobic reaction/anxiety/depression following a beating and assessed the claimant as having confused/anxious mental status, perforated right eardrum, and decreased auditory acuity on right. He stated the rest of claimant's exam was normal.

Claimant was also referred for psychiatric treatment. On September 4th, Dr. S Corning, a clinical psychologist, wrote that claimant suffered a post traumatic stress disorder following being assaulted on July 3rd. She also stated that his ability to perform his job and routine duties had been seriously impaired and that he had experienced depression, sleep difficulties, nightmares, paranoia, difficulty concentrating, memory difficulties, and loss of appetite. He was also seen by Dr. C, a psychiatrist who recommended a course of rehabilitative treatment including testing, bio-feedback and group therapy.

The claimant testified that he had been a successful car salesman prior to the accident, but that thereafter, "I wasn't the same guy." Mr C, a sales manager at his subsequent employer, said claimant had been referred to him by Mr B but that he was terminated for poor performance. He said the claimant never mentioned any medical problems, nor seemed to have any problems getting around. Claimant came to him his last day on the job and told him he had medical problems and wanted a leave of absence.

The claimant challenges the hearing officer's determination that the claimant did not suffer a compensable injury and did not have disability. Claimant argues that the hearing officer erred in not giving greater weight to his medical records, and in failing to give even a scintilla of weight to Mr. Bs recorded statement.

The claimant in a workers' compensation proceeding has the burden of proof to establish that he sustained an injury in the course and scope of his employment. Reed v. Aetna Casualty and Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ

ref'd n.r.e.). In the discussion section of his decision and order, the hearing officer clearly indicated he found the claimant's testimony to be non-credible, citing numerous changed versions of the incident. He also said there was not "one scintilla of independent evidence that the claimant showed any physical signs immediately after the event of having been assaulted." The hearing officer is sole judge of the relevance and materiality of the evidence offered and of its weight and credibility. Article 8308-6.34(e). As finder of fact, he resolves conflicts in the testimony and in evidence. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. Civ. App.-Houston [14th Dist.] 1984, no writ). When presented with contradictory evidence, the trier of fact may believe one witness and disbelieve others. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561 (Tex. 1952). The hearing officer may believe all, part, or none of any testimony; judge credibility; assign weight; and resolve conflicts and inconsistencies. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. Civ. App.-Amarillo 1988, writ denied).

The evidence in this case was in almost total conflict; frequently the claimant's own testimony was conflicting with regard to the alleged injury and occurrences thereafter. There is no indication the hearing officer did not consider all the evidence in the case, including the medical reports and the statement of Mr. B; however, he was entitled to assign this evidence the appropriate weight, as noted above. This panel will not substitute its judgment for that of the hearing officer unless it is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). Upon review of the record in this case, we decline to make such a determination.

The decision and order of the hearing officer is affirmed.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge